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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 670

ADDISON MILLER, A. T. MILLER, AND GEORGE FALTICO, PARTNERS, DOING BUSINESS AS ADDISON MILLER COMPANY, ADDISON MILLER, INC., ET AL.,

vs. *Petitioners,*

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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No. 670

ADDISON MILLER, A. T. MILLER, AND GEORGE FALTICO, PARTNERS, DOING BUSINESS AS ADDISON MILLER COMPANY, ADDISON MILLER, INC., GREAT NORTHERN ICING COMPANY, AND ADDISON MILLER, INC. (ILLINOIS),

Petitioners,

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MAY IT PLEASE THE COURT:

Petitioners, who are defendants in the Complaint show to this Honorable Court:

A.

Summary of the Matter Involved.

July 17, 1941, a complaint was filed in the District Court of the United States for the District of Minnesota by the Administrator of the Wage and Hour Division, United

States Department of Labor, to enjoin violations of the Fair Labor Standards Act by the defendants, jurisdiction of the action being conferred upon the Court by Section 17 of the Act. Pursuant to stipulation between the parties, defendants entered a general appearance, waived service of process and consented to an immediate entry of judgment (R. 13-17).

The judgment filed July 17, 1941 enjoined defendants from violation of the Fair Labor Standards Act and ordered that the stipulation be incorporated in and made a part of the decree. The stipulation required the payment of restitution to employees of defendants based on schedules approved by or prepared by the Administration (R. 10-12).

Motion to vacate the judgment was filed by defendants January 14, 1942 (R. 18-29) showing that the business activities of the defendants, as set forth in the complaint, were such that: (1) subsequent to the consent decree a large number of their employees were, in effect, found to be employees of a carrier as defined by the Interstate Commerce Act (I. C. C. Docket, Ex Parte No. 72 [Sub. No. 1]). This finding being relied upon makes defendants subject to the Railroad Retirement Act (Title 45, U. S. C., Sec. 228 et seq.) and to the Railroad Unemployment Insurance Act (Title 45, U. S. C. Sec. 351 et seq.); and, therefore, exempts the said defendants from the provisions of the Fair Labor Standards Act.

(2) The majority of the employees of defendants, beneficiaries under the judgment, were employed pursuant to collective bargaining agreements made with Railway Labor Unions;

(3) The National Mediation Board (Title 45, U. S. C. Secs. 154 and 155) subsequent to the filing of the judgment, on July 23, 1941, claimed jurisdiction to settle a dispute

between some defendants as carriers and various railroad unions.

(4) If defendants were found to be carriers they would be subject to the Railway Labor Act, the Railroad Unemployment Act and the Carriers Taxing Act of 1937 (Title 45, U. S. C. Sec. 261 et seq.) as well as the Social Security Act and thus be exposed to multiple and inconsistent liabilities.

(5) The Court was without jurisdiction to order payment of restitution in a suit based on the authority of Section 17 of the Fair Labor Standards Act.

(6) The judgment was induced by representations of plaintiff's representatives that defendants were subject to the Fair Labor Standards Act which the defendants believed at the time, and the judgment was entered because of defendants' mistake, inadvertence, surprise or excusable neglect entitling defendants under Rule 60 (b) of the Rules of Civil Procedure to the relief prayed for.

In his Memorandum Order of November 14, 1942, United States District Judge, Matthew M. Joyce, ordered the decree's order to be modified to the extent of relieving the defendants from payment of restitution "Because Section 16 (b) of the Fair Labor Standards Act gives to employees a right to recover their wages and because Section 17 does not expressly permit the recovery of wages in an action brought under Section 17, any incidental powers which the court might have under that section are withdrawn, for when a statute creates a right (liability) and gives a special remedy for its enforcement, that remedy is the exclusive one. Therefore, the Court lacked jurisdiction in this action" (R. 39-54).

The Administrator filed an Appeal in the Eighth Circuit Court of Appeals in June, 1943, and on November 9, 1943,

that Court, through Justice Thomas, reversed the order appealed from (R. 134-141).

In the decision the Court held in substance:

(1) That all errors going to the merits and remedial on appeal are waived by consent to the decree.

(2) That although defendants challenge the jurisdiction of the Court on the ground that the Fair Labor Standards Act does not authorize the Administrator to maintain a suit for restitution of wages that may be due by virtue of any violation of Sec. 15 because such power is granted solely to employees by Sec. 16 (b) of the Act, the inclusion of the order for restitution in the consent decree did not go to the jurisdiction or power of the Court but to the merits only.

(3) The contention that the Administrator lacked authority to maintain an action for restitution because the statute having created a right (a liability) and having given a special remedy for its enforcement, that remedy is exclusive may be sound but it shows only the court erred in rendering the decree.

B.

Reasons Relied Upon for Allowance of Writ.

1. The question of the jurisdiction of the United States District Court to Order, in a consent decree, the payment of restitution of alleged unpaid compensation to employees in an action brought by the Administrator of the Wage and Hour Division, United States Department of Labor under Section 17 of the Fair Labor Standards Act (29 U. S. C. Sec. 201 et seq.) is presented for the first time to this Honorable Court for its review and consideration. This Honorable Court should grant writ of certiorari because it is to the interest of the public, the Government and the Courts that this important question be finally determined.

2. The question whether the jurisdiction of courts of limited jurisdiction and the powers of administrative agencies of the Government may be enlarged through the instrumentality of consent decrees is a matter of public policy which is squarely before the Court in this matter and should be finally resolved and determined.

3. The question whether a previous decision of this Court lays down the rigid rule that consent agreements incorporated in decrees of courts of equity, although they may have been palpably entered into through improvidence, mistake or misunderstanding, are not reviewable in any case requires the clarifying decision of this Court.

4. The holding of the Circuit Court that the inclusion of the order for restitution in the consent decree did not go to the jurisdiction or the power of the Court but to the merits only is in conflict with applicable decisions of this Court and Circuit Courts.

A-4. Ex parte in the *Matter of Lange,* Petitioner, 18 Wall. 163, 21 L. Ed. 872, 879; *United States* v. *Turner,* C. C. A., Eighth Circuit, 47 Fed. (2d) 86, 88; *Windsor* v. *McVeigh,* 93 U. S. 274, 282, 23 L. Ed. 914; *United States* v. *Cooper Corporation, et al.,* 312 U. S. 600, 620, 85 L. Ed. 1071.

5. The holding of the Circuit Court that although the contention may be sound that the Administrator lacked authority to maintain an action for restitution because the statute having created a right (a liability) and having provided a special remedy for its enforcement, that the remedy is exclusive, shows only that the court erred in rendering the decree and in finding at that time that the remedy given the employees is not exclusive, the error pertaining to the capacity of the Administrator, not to the power or jurisdiction of the Court, is in conflict with applicable decisions of this Court.

A-5. *Pollard* v. *Bailey*, 87 U. S. 520, 20 Wall. 520; *Globe Newspaper Company* v. *Walker*, 210 U. S. 356, 20 S. Ct. 726; *Decorative Stone Co.* v. *Building Trade Council*, 23 Fed. (2d) 426, Cert. denied 277 U. S. 594, 74 L. Ed. 1005.

6. The holding of the Circuit Court that the District Court having jurisdiction of the parties and of the subject matter the validity of the judgment, when collaterally attacked, is not affected by an erroneous decision neglects to consider the fact that there was an attack on the jurisdiction of the court showing that the court lacked jurisdiction of the res insofar as restitution was involved and thus could not enter a decree even by consent of the parties that could be pleaded as res adjudicata or be a bar to future suits by those authorized by the statute to bring such action.

A-6. *Valley* v. *Northern F. & M. Ins. Co.*, 254 U. S. 348, 41 S. Ct. 116, 117, 65 L. Ed. 297; *Marietta Chair Co.* v. *Henderson*, 49 S. E. 312; *Supreme Court of Minnesota* v. *Northern Security Company*, 184 U. S. 199, 235, 22 S. Ct. 308, 322, 46 L. Ed. 499; *Bowen* v. *Baker et al.*, 35 Fed. Supp. 852, 855; *Swift & Co.* v. *Hocking Valley R. R.*, 243 U. S. 283, 289, 61 L. Ed. 723; *California* v. *San Pablo Tulare Railroad Co.*, 149 U. S. 308, 314, 37 L. Ed. 747; *Strand* v. *Garden Valley Telephone Co.*, 51 Fed. Supp. 898.

Wherefore, petitioners respectfully pray that writ of certiorari be issued out of and under seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that Court to certify and send to this Court for its review and determination on a day certain to be therein named, full and complete transcript of the record of all proceedings in the case No. 12,574, *L. Metcalfe Walling, etc., Appellant,* v. *Addison Miller, et al., Appellees,* and that the decree and judgment of said Circuit Court of Appeals may be reversed by the

Honorable Court, and that your petitioners may have such other and further relief as to this Honorable Court may seem just.

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